APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3038-59

ALBERT L. ADELMAN AND ELEANOR ADELMAN
Plaintiffs

vs

ST. LOUIS FIRE & MARINE INSURANCE
COMPANY, *Defendant*

Memorandum

Plaintiffs seek to recover under a fire insurance policy issued by the defendant on June 15, 1958 in the sum of $18,000 coverage on the dwelling, $7,200 on personal property and $1,800 for living expenses, as well as certain other coverage. In addition to said policy, plaintiffs held a policy of fire insurance with the American Equitable Assurance Company of New York in the sum of $14,000 insuring the same dwelling against fire, and a further policy on the furniture in the sum of $7,500 with American Insurance Company of Newark.

A fire occurred on the insured premises on April 16, 1959. It was stipulated during the trial that the damages to the dwelling was $7,184.88; to the personal property, $7,422.37; and that the plaintiffs sustained loss of living expenses in the sum of $1,800.

This case came on for trial before the Court without a jury on May 4, 1960. At the outset of the trial the defendant raised three defenses: (1) non-payment of premium, (2) failure to provide written proof of loss in accordance with the policy, (3) a violation of a provision of the policy prohibiting other insurance.

During the trial the first defense was abandoned by the defendant and the case was submitted upon defenses 2 and 3—failure to provide proof of loss and violation of a policy provision prohibiting further insurance.

Plaintiffs concede that written proof of loss was not submitted within the time required by the policy, but assert that such proof of loss was waived by the defendant.

As to the other defense, plaintiffs maintain that if there was a violation of the policy as to further insurance, it did not void the policy.

In view of the Court's conclusion that plaintiffs are barred from recovery because they failed to file written proof of loss and that there was no waiver of this requirement in the policy, it is unnecessary for the Court to determine the effect of the provision in the policy prohibiting other insurance.

Shortly after the fire, and within the 60-day period in which plaintiffs were required to file a written proof of loss, an adjuster for the defendant company interviewed plaintiffs, and when he discovered there were two other policies in force covering this property, he secured from plaintiffs a non-waiver agreement. This non-waiver agreement was signed within the 60-day period in which proof of loss was required.

It is conceded that plaintiffs failed to file such written proof within the 60-day period, but plaintiffs assert that defendant waived this requirement despite the non-waiver agreement. Both parties agree that Maryland law controls in resolving this issue. Plaintiffs assert they have been unable to find a case in Maryland precisely in point, but rely principally upon *Springfield Fire and Marine Ins. Co.* v. *Fine*, 216 Pac. 898, 90 Okla. 101. However, the facts in the *Springfield* case are clearly distinguishable from those in the case at bar. The adjuster in the *Springfield* case told the insured he was satisfied with the proof sub-

mitted and that the company would pay the policy within a short time.

In this case, the evidence does not show any offer or promise by the adjuster to pay the loss after the execution of the non-waiver agreement, nor does it show any fraud, duress, or overreaching of any sort on the part of the adjuster. Further, the Court finds there was no expression of any willingness on the part of defendant to proceed with the question of liability without securing written proof of loss or any representation or statement to the insured which might lead them to assume that the requirement might be dispensed with, or to make them delay compliance, nor were there any other statements or acts by the adjuster which could reasonably be construed to constitute a waiver of the requirement to file written proof of loss within the 60 days.

While it is recognized that under certain circumstances there may be a waiver even though a non-waiver agreement has been signed, such as in the *Springfield* case, this is not such a case. Absent any fraud or overreaching or any facts indicating an intention on the part of insuror to waive the agreement, non-waiver agreements have been sustained as valid (*Fidelity Phoenix Insurance Company of New York* v. *Vincent*, 7 S.W. 2d 203, 224 Ky 769, *Provident Fire Insurance Co.* v. *Ashy*, 162 S.W. 2d 684, 139 Tex. 334. See also *Grangers Mutual Fire Insurance Co. of Frederick, Md.* v. *Bleive*, 157 Md. 426, 146 Atlantic 239).

The Court holds, therefore, that plaintiffs are precluded from recovering in this case because of failure to file written proof of loss within 60 days, as required by the policy, which requirement was not waived by defendant.

This memorandum may be considered as findings of fact and conclusions of law.

LUTHER W. YOUNGDAHL
Judge

June 17, 1960